APPEAL NO. 041235
FILED JULY 15, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on April 21, 2004. The hearing officer decided that the appellant (claimant herein) did not sustain a compensable injury on _____; that the injury did not extend to the claimant's cervical, thoracic, or lumbar spine; and that the claimant did not have disability. The claimant appeals, arguing that these determinations are contrary to the evidence. The respondent (carrier herein) replies that the claimant's appeal is untimely and that the evidence supported the decision of the hearing officer. The carrier also argues that we should not consider documents attached to the claimant's appeal which were not introduced into evidence.

DECISION

Determining that we have jurisdiction and finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

Since it is jurisdictional, we first address the question of the timeliness of the claimant's appeal. Records of the Texas Workers' Compensation Commission (Commission) show that the decision of the hearing officer was mailed to the claimant on April 26, 2004. Pursuant to Section 410.202(a), a written request for appeal must be filed within 15 days of the date of receipt of the hearing officer's decision. Section 410.202 was amended effective June 17, 2001, to exclude Saturdays, Sundays, and holidays listed in Section 662.003 of the Texas Government Code from the computation of time in which to file an appeal. Section 410.202(d). Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § Rule 143.3(c) (Rule 143.3(c)) provides that an appeal is presumed to have been timely filed if it is mailed not later than the 15th day after the date of receipt of the hearing officer's decision and received by the Commission not later than the 20th day after the date of receipt of the hearing officer's decision. Both portions of Rule 143.3(c) must be satisfied in order for an appeal to be timely. Texas Workers' Compensation Commission Appeal No. 002806, decided January 17, 2001.

The claimant states in her request for review that she received the hearing officer's decision on April 26, 2004. As this was the same date upon which the decision was mailed to the claimant, this is not possible and would seem to simply be a statement of the date of the hearing officer's decision rather than the date it was received by the claimant. In the past, when a claimant has stated a date of receipt that is an impossibility, we have applied the presumed date of receipt pursuant to Rule 102.5(d). *See* Texas Workers' Compensation Commission Appeal No. 020438, decided March 26, 2002. We note that pursuant to Rule 102.5(d) the claimant was presumed to have received the decision five days after it was mailed or on May 1, 2004. The claimant mailed her request for review to the Commission, which was postmarked May

21, 2004, and the Commission received it on May 26, 2004. Thus, since she mailed her request for review to the Commission within 15 days and it was received within 20 days of the date the claimant was deemed to have received the hearing officer's decision, the claimant's request for review is timely. *See* Section 410.202(a); Rule 143.3(c).

The claimant attaches documents to her appeal that were not admitted into evidence at the CCH. First, we note that we will not generally consider evidence not submitted into the record, and raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that the case be remanded for further consideration, we consider whether it came to the appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). The documents in question fail to meet this standard. The claimant contends that these documents were not offered at the CCH because her attorney failed to exchange them with the carrier. This contention itself shows lack of diligence and the claimant is charged with the lack of diligence of an attorney she chose to hire to represent her.

There was conflicting evidence presented on the disputed issues of injury, extent of injury, and disability. The issues of injury, extent of injury, and disability are questions of fact. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given to the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals-level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard, we find no basis to reverse the hearing officer's resolution of the injury, extent of injury, or disability issues.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **SECURITY INSURANCE COMPANY OF HARTFORD** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Chris Cowan
Appeals Judge